SUPREME COURT, U. S.
Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1271

HENRY E. COWAN, SUPERINTENDENT
KENTUCKY STATE PENITENTIARY .... PETITIONER

vs.

MAXWELL OLIVER ..... RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The petitioner, Henry E. Cowan, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit decided November 21, 1973.

OPINION BELOW

The judgment and order of the United States Court of Appeals for the Sixth Circuit is reported as *Oliver* v. *Cowan,* 487 F.2d 895 (6th Cir. 1973).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on November 21, 1973. This petition was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER A SHOWING OF PREJUDICE TO SUBSTANTIAL RIGHTS AS THE RESULT OF THE LACK OF COUNSEL AT FINAL SENTENCING IS REQUIRED BY A HABEAS CORPUS APPLICANT WHEN THE JURY IS REQUIRED TO ASSESS THE SENTENCE AND THE JUDGE HAS NO DISCRETION ON THE IMPOSITION OF SAID SENTENCE.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution involved are the Sixth and the Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On January 21, 1959, in the Harlan Circuit Court, Harlan County, Kentucky, the respondent, Maxwell Oliver, with the assistance of counsel, entered a plea of guilty to the offense of wilful murder and his punishment was fixed by a jury at life imprisonment.

On February 27, 1973, the United States District Court for the Eastern District of Kentucky, the Honor-

able Bernard T. Moynahan, Jr., Judge, entered an Order sustaining petitioner's petition for habeas corpus relief. The District Court found, as a matter of fact, that petitioner was not represented by counsel at his final sentencing. As a conclusion of law, the District Court stated:

> "The formal sentencing is a critical stage in a criminal proceeding to which a defendant is entitled to assistance of counsel, when such sentence is imposed pursuant to punishment fixed by a jury as part of its verdict."

The petitioner appealed the order of the District Court to United States Court of Appeals for the Sixth Circuit. An *Agreed Statement of the Case, Findings of Fact and Conclusions of Law and Judgment Appealed From* was filed and certified to the Court of Appeals, pursuant to Federal Rules of Appellate Procedure, Rule 10(d).

The sole issue presented on appeal was: 'Whether formal sentencing is a critical stage in a criminal proceeding in Kentucky to which a defendant is entitled to assistance of counsel, when such sentence was imposed pursuant to punishment fixed by a jury as a part of its verdict after the defendant has entered a plea of guilty with the advice and assistance of counsel."

On November 21, 1973, the Sixth Circuit Court of Appeals affirmed the judgment of the District Court. The Court of Appeals directed that upon remand an order will be entered granting the habeas corpus pe-

tition of Maxwell Oliver unless he is resentenced with either retained or appointed counsel present within sixty (60) days from the entry of such order. It is from this Judgment that a review is sought.

REASONS FOR GRANTING THE PETITION

This petition should be granted due to the direct conflict between the decisions of the United States Sixth Circuit Court of Appeals and other circuit courts of appeal on the same matter of general law. This decision involves the question of whether or not prejudice must be shown by the absence of counsel at final sentencing when the jury assesses the punishment and the judge has only the ministerial duty of pronouncing this sentence. This Court should note that this decision is in direct conflict with both the Fifth and the Eighth Circuit Courts of Appeal and with decisions of the Court of Appeals of Kentucky.

The Court of Appeals of Kentucky has held that sentencing is not a critical stage and the presence of counsel is not required where the duty of the trial judge at final sentencing is purely ceremonial. The Kentucky Court of Appeals, in *McIntosh* v. *Commonwealth*, 368 S.W.2d 331 (1963), noted that Kentucky is one of the few states in which the degree of punishment is required to be fixed by the jury and "when the court has no discretion with respect to assessing punishment, the allocution and pronouncement of sentence are more ceremony than substance." See, also, *Collins* v. *Commonwealth*, Ky.,

433 S.W.2d 663 (1968), and *Thomas* v. *Commonwealth*, Ky., 437 S.W.2d 512 (1969).

The conflict between the Sixth Circuit and other circuits is evidenced by decisions of the Fifth and Eighth Circuits which involve cases arising out of a conviction had in a state where, like Kentucky, the punishment is assessed by the jury and the trial judge has no discretion concerning punishment. In *Fairris* v. *Beto*, 446 F.2d 1290 (5th Cir. 1971), the Fifth Circuit Court of Appeals decided that a petitioner convicted in Texas bears the burden of proving how he was prejudiced by lack of counsel at sentencing. The Court there stated:

> ". . .In this specific factual setting counsel is not required by due process of law standards. The sentencing was of a purely mechanical nature, carrying out the mandates of the jury. *See* Vitoratos v. Maxwell, 351 F.2d 217 (6th Cir. 1965), appeal dismissed, 383 U.S. 105, 86 S.Ct. 718, 15 L.Ed.2d 618 (1966); Williams v. Beto, 354 F.2d 698 (5th Cir. 1965). *Petitioner has not shown how he was prejudiced by the lack of counsel*, nor could he from the facts set out herein. The decision of Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), is not controlling here. *See* Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)." (Emphasis added.)

The Eighth Circuit Court of Appeals has also rendered a decision directly in conflict with the Sixth Circuit. In *McClain* v. *Swenson*, 435 F.2d 327 (8th Cir. 1970), the Eighth Circuit, in a case arising out of a Missouri conviction, concluded that in order for a petitioner to be

entitled to habeas corpus relief, it was necessary that he show prejudice by the lack of counsel at formal sentencing. The Sixth Circuit's decision indicates that all that needs to be proven is the physical absence of counsel at final sentencing and prejudice per se is presumed from this fact. For this reason, it is readily apparent that there is a direct conflict between the various circuit courts of appeal, and certiorari should be granted in order to resolve this conflict.

This petition should also be granted because it presents a substantial question of Federal law which is of particular importance because it will directly affect an untold number of valid state court convictions and possibly allow convicted felons to be set free after a long period of incarceration. As is noted by the Kentucky Court of Appeals in *McIntosh* v. *Commonwealth*, supra, there are nine states which, with various exceptions, provide that a jury may or must assess punishment.

The impact of the Sixth Circuit's decision is that, in many of these states, like Kentucky, it would be possible for a petitioner to merely prove that his counsel was not physically present at sentencing. Based upon the Sixth Circuit's decision, prejudice would then be presumed and it would be incumbent upon the state to disprove this prejudice.

After the writ of habeas corpus is granted upon this bare allegation, it will be necessary for the state to resentence the petitioner with counsel present. This in itself would not be a great burden upon the states. However, the Kentucky Rules of Criminal Procedure

provide (as no doubt the rules of other states do) that a defendant can withdraw his plea of guilty at any time before final judgment. It is entirely possible, therefore, that the petitioners involved could withdraw their guilty pleas and demand to be tried upon a charge which may be as much as thirty years old. Needless to say, this would be difficult if not impossible in most all of the cases.

CONCLUSION

The Sixth Circuit has held that the absence of counsel at final sentencing is per se prejudicial to a defendant's substantial rights. The Fifth and Eighth Circuits have held that prejudice must be proven. Petitioner submits that it is necessary for the Court to review the decision of the Sixth Circuit to settle this conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James M. Ringo, one of counsel for petitioner, hereby certify that the foregoing Petition was served on respondent by depositing three copies of same in the United States mail, first class postage prepaid, on February 15, 1974, addressed to counsel for respondent, Honorable Curtis L. Wilson, 234 N. Limestone Street, Lexington, Kentucky 40507.

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